Jurisdictional Statement

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.....

THE NEW RIVER COMPANY,
Petitioner-Appellant,
v.
DAVID W. ROBINSON, CHIEF,
WATER RESOURCES DIVISION,
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WEST VIRGINIA,
Respondent-Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

WILLARD A. SULLIVAN
JOHN J. COWAN
SULLIVAN AND COWAN
220 Morrison Building
P. O. Box 3712
Charleston, WV 25337
Counsel for Appellant

OF COUNSEL:
JAMES AUDLEY MCLAUGHLIN
College of Law
West Virginia University
Morgantown, West Virginia 26505

August 1, 1981

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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THE QUESTION PRESENTED BY THE APPEAL.

Whether a state law that imposes a multimillion dollar liability on a coal operator for abatement of non-nuisance type alkaline iron mine drainage caused entirely by mining activity completed eleven years before enactment of the law imposing liability is unconstitutionally retroactive in violation of the Fourteenth Amendment of the United States Constitution.

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OPINIONS BELOW

The opinions below are unpublished and reproduced in Appendices as follows:

The letter opinion of the Circuit Court of Kanawha County is Appendix A; the Order, Finding of Fact, and Conclusions of Law of the Water Resources Board of West Virginia in Appeal No. 104, Case No. 284, is Appendix B; the Order Denying an Appeal to the West Virginia Supreme Court of Appeals of March 31, 1981, is Appendix C; the Order Denying an Appeal to the West Virginia Supreme Court of Appeals of May 5, 1981, is Appendix D.

JURISDICTION

On May 5, 1981, the West Virginia Supreme Court of Appeals entered an order refusing to hear an appeal from the Circuit Court of Kanawha County, of a review by appeal to that court under the West Virginia Administrative Procedures Act (§ 29A-5-4, West Virginia Code of 1931 as amended) as authorized by § 20-5A-16, West Virginia Code of 1931 as amended of the Water Pollution Control Act. A Notice of Appeal was filed in the West Virginia Supreme Court of Appeals on July 27, 1981. (Appendix E)

Jurisdiction of the appeal is based on 28 U. S. C. § 1257 (2). Sections 20-5A-5 and 20-5A-7, West Virginia Code of 1931 as amended, parts of the West Virginia Water Pollution Control Act, were challenged as repugnant to the United States Constitution, as applied to Appellant, New River, in this case, and their validity, as applied, were upheld by the West Virginia courts. *Dahnke-Walker Mining Co* v. *Bondurant*, 257 U. S. 282 (1921); *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 61 n.3 (1963); *Cohen* v. *Cailfornia*, 403 U. S. 15, 17-18 (1971).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides in part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law* * *"

The pertinent parts of the West Virginia Water Pollution Control Act of 1964 as amended is reproduced in Appendix F, which is a chronological history of coal mine drainage law in West Virginia from 1903 to 1978.

Section 3.01 of the Administrative Regulations of the State of West Virginia for Water Quality Criteria for Inter and Intrastate Streams provides:

> "3.01 Certain characteristics of sewage, industrial wastes or other wastes or factors which render water directly or indirectly detrimental to the public health or unreasonable and adversely affect such waters for present or future reasonable uses, are objectionable in all water of the State. Therefore, the State Water Resources Board does hereby proclaim that the following general conditions are not to be allowed in any of the waters of the State.
>
> No sewage, industrial wastes or other wastes present in any of the waters of the State shall cause therein or materially contribute to any of the following conditions:
>
> * * *
>
> (b) Objectional deposits on bottom or sludge banks;"
>
> * * *

STATEMENT OF THE CASE

This case involves the liability for post-operation clean-up of the lingering effects of a coal mining operation in the form of nearly perpetual iron drainage at the site of the former mining activity. Pertinent to this case, Appellant New River Company, operated five deep mines in Raleigh and Fayette Counties, West Virginia, between the towns of Beckley and Mount Hope from 1903 to 1958. The five mines have, since 1915, had an interconnected water drainage system (being on a mountain slope).

In 1958, the last of the five mines, the Cranberry Mine, was abandoned. The pumps draining a naturally flooded area in that mine (second up the slope) were pulled and the mine reflooded. After 1958 the five abandoned mines all naturally discharged at the hoist shaft of the Price-Hill Mine, the lowest on the slope of the five mines.

There is iron at the level of 8-12 milligrams per liter of water in the discharge at Price-Hill hoist shaft. The discharge is into a small non-navigable stream called Dunloup Creek. The discharge is alkaline, not acidic. This causes the iron to precipitate out onto the stream bed. None reaches the New River into which Dunloup Creek flows.

The deep mining of coal leaves support pillars inside the earth and water dripping over these pillars picks up iron oxides. It is this that causes the iron discharges at Price-Hill hoist shaft. This process can go on for hundreds of years after the mine is abandoned.[1] It is called "natural" mine drainage and in West Virginia this natural drainage was expressly privileged from the stream pollution laws from 1915 to 1953. (See Appendix F for a

[1]See the USEPA's backgound commentary to Proposed Regulations to limit efficient discharges into U. S. waters caused by coal mining. 46 Fed. Reg. 3138 (Jan. 13, 1981).

chronological compendium of pertinent West Virginia water pollution control laws.) Most of the coal in New River's five downhill mines was mined before 1953.[2] Between 1953 and 1967 only new source pollution was controlled (See Appendix F) in West Virginia. One Hundred percent (100%) of the mining activity causing the mine water discharge in this case was completed by 1958, when there was yet no legal liability for active mine drainage where the mine had opened prior to 1953.

In 1964, West Virginia passed a new Water Pollution Control Act that still controlled only new source pollution (see Appendix F) but contained a warning that there is "no right to continue existing pollution", promising laws in the future that would stop old source pollution. (See Appendix F.) In that act in 1964 "outlets for mine water drainage" were mentioned for the first time and new outlet or substantial enlargement of an existing outlet needed a permit.

In 1966 the Appellant, New River Company, reopened the half-flooded Cranberry Mine, the mine next above the Price-Hill Mine, in order to "pull the pillars of coal remaining in the mine" (See Appendix B, Findings of Fact of the Water Resources Board,) in the unflooded half. In 1966, when Cranberry Mine was reopened, New River neither needed or obtained a permit to discharge out Price-Hill shaft because the pillar pulling activity did not "make . . . any *new* outlet or substantially enlarge or add to the load of any existing outlet." (Emphasis added.) Because New River planned to pump 15-20 thousand

[2]Price-Hill Mine closed in 1938, Mabscott Mine in 1945, Sprague Mine in 1951, Skelton Mine in 1957, Cranberry Mine in 1958. Given the opening dates of each mine (Appendix B, Findings of Facts Nos. 6, 7, and 9) and counting each year a mine was operated as a mine-year, then these five mines, assuming continuous operation, had 224 mine years total, 215 of which were expended by 1953. In terms of the crude measurement of "mine-years", then 96% of the mining activity, causing the present iron discharge was finished by 1953; 100% by 1758.

gallons per day (T. 77)[3] to a cleaning plant, i.e. "to make a new outlet", they needed and obtained a permit (T. 104) for that limited purpose under then §20-5A-5, West Virginia Code. When in 1973 Appellant abandoned Cranberry Mine, it pulled that pump and the 20,000 gallons again flowed out of Price-Hill shaft. In other words, during the years 1966-73 a small amount of water[4] that, since 1958 had been flowing out Price-Hill shaft, was diverted for the seven years of operation. Then in 1973, it was returned to Price-Hill shaft discharge. Thus, the only permit New River had had to apply for under the law as it obtained until they abandoned in 1973, was for a small diversion to a preparation plan between 1966 and 1973.

In 1969 the Water Pollution Control Act of 1964 was amended to include a requirement of obtaining a permit to abandon a mine. The pillar removal operation at the Cranberry Mine between 1966-73 did not alter the flow (except the tiny amount diverted to the preparation plant) nor increase the iron content of the water discharging from the Price-Hill hoist shaft. (See Appendices A and B.)[5] When in September, 1973, pillar removal at

[3]This and other "T" references are to the "transcript of proceedings" taken on November 14, 1978, before the State Water Resources Board. It is not yet before this Court.

[4]20,000 gallons per day is a tiny amount of water in comparison to the 14 million gallons per day pumped by the four pumps pulled from Cranberry Mine in 1956. (T. 51 & 57) In other words, the 20,000 gallons temporarily diverted to the preparation plant was 1/700th of the maximum discharge out Price-Hill hoist shaft.

[5]Board Findings of Fact #20 and #21 merely state that water flows through Cranberry Mine and out the Price-Hill hoist shaft. It had been so flowing since 1953. Board Conclusion of Law #15 stated that: "The discharge from the Cranberry Mine through the Price-Hill shaft is contributing the [sic] iron deposits to the waters of the State of West Virginia," is misleading. It is *not* a finding that mining activity between 1966 and 1973 (or after 1969) increased the iron flow. Of course, iron from Cranberry Mine as well as the other four mines contributed to the total iron flowing out Price-Hill hoist shaft as it had been since 1958. There, moreover, is no evidence in the transcript from which an inference that the 1966-73 pillar pulling contributes one ounce of iron to the discharge. Common sense would suggest that, if anything, pillar pulling by decreasing the total surface of coal exposed to water would decrease the iron oxides deposited therein.

Cranberry Mine was exhausted, a pro forma request to abandon a mine under the 1969 amendment was made to the Chief of the Water Resources Division of the West Virginia Department of Natural Resources. In March of 1975, the application for a permit was denied by the Appellee, the Chief of the Water Resources Division. This ruling denying the permit was affirmed on appeal to the West Virginia Water Resources Board in April of 1976.

On June 15, 1976, the Appellant submitted to the Water Resources Division a second application for a permit to abandon its Cranberry Mine Operation. In this application the New River Company proposed to build several aeration walls in Dunloup Creek to help speed the precipitation of iron oxide onto the bed of the creek.

On November 5, 1976, the Chief of the Water Resources Division, the appellee, herein, denied the request on the basis that the iron discharge at Price-Hill hoist shaft was "connected" to the Cranberry Mine (See Board Finding of Fact #33 in Appendix B) and that the Price-Hill hoist shaft discharge violated Sec. 3.01(b) of Administrative Regulations of the State for Water Quality in that it caused "objectionable deposits" on the bottom on Dunloup Creek. Subsequently, the appellant appealed this ruling to the Water Resources Board and a hearing was held on November 14, 1978, and some 300 pages of testimony were transcribed. On July 31, 1979, the Water Resources Board affirmed the decision of the Chief with findings of facts and conclusion of law. (See Appendix B.) There was no finding that the mine operation between 1966 and 1973 changed in any way the quantity or quality of the iron discharge at the Price-Hill hoist shaft. (See Note 5, *supra.*) As noted above, appellant had during that operation applied for no permit in connection with the discharge at the Price-Hill hoist shaft because

the pillar pulling operation had no effect on the old discharge. No protest or mention has ever been made to this lack of a permit during active operation of Cranberry Mine.

The order affirming the decision of the Chief was appealed to the Circuit Court of Kanawha County, West Virginia (Charleston). The appeal was on the record made at the November 14, 1978, hearing before the Water Resources Board. Briefs were submitted by both sides but no new evidence was taken. (See § 20-5A-16, West Virginia Code.)

By an opinion in the form of a letter sent to counsel on October 22, 1980 (reprinted here as Appendix A), the Circuit Court judge affirmed the Water Board's order in all respects and an order so stating was entered on December 24, 1980. (Appendix A.)

The constitutional issues here raised were first raised as a matter of record on November 14, 1978, at the hearing before the State Water Resources Board. (See Transcript of Procedings, p. 12-20, Opening Statement by Mr. Sullivan, attorney for The New River Company.) The Board did not specifically address the issue of the retroactivity of the liability.

The issues were again raised before the Kanawha County Circuit Court by Brief, Reply Brief and in oral presentation. The Circuit Court's letter memorandum and order are in Appendix A. The Circuit Court found that because "the Water Resources Division is seeking to control an existing condition, this Court is of the opinion that West Virginia Code, § 20-5A-5, is not being applied to the petitioner retroactively." The Circuit Court later quotes from *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. (1976) to the effect that legislation is not unlawful

"solely because it upsets otherwise settled expectation." (Apendix A.)

The Court refused to grant a rehearing and entered a final order December 24, 1980. A petition asking the Supreme Court of Appeals to hear an appeal from the Circuit Court was timely filed and counsel appeared and orally petitioned the Court on March 23, 1981 raising again the federal constitutional issue. On March 31, 1981, an order refusing the appeal was entered. No reason was given. (Appendix D.) Justice Richard Neely voted to grant the petition. Justice Thomas McHugh did not participate having been the circuit judge whose decision was being appealed. A reconsideration of the decision refusing the appeal was requested within rule of court. On May 5, 1981, oral petition was again made to the court and by order of May 5, 1981, was again refused by the same vote count (Appendix E). Notice of Appeal was served on the Office of the Attorney General of West Virginia and filed with the Clerk of the Supreme Court of Appeals on July 27, 1981.

THE QUESTION PRESENTED IS SUBSTANTIAL

This Court Should Give Plenary Consideration To The Important And Substantial Question Of The Constitutionality Of Retroactive Environmental Protection Laws As Applied To The Coal Industry Especially Where Such Retroactivity Is Not Justified By Fair Warning And There Is No Exigent Public Necessity For Such Retroactivity And There Is No Lack Of Just And Adequate Alternative Means To Achieve The Public Ends Sought By The Legislation.

Because post-operation mine drainage is a serious environmental problem* the temptation to draconian mea-

*USEPA Proposed Rules, *supra*, at 3144.

sures against coal operators who can still be identified with and somehow tied to an existing source is great. Ironically, the operators so identified are likely to be the more responsible operators, those who have not simply "walked away" from the mine after extracting all recoverable coal.[7] Such draconian measures take the form of retroactive imposition of liability—a liability which cannot be "costed"[8] out and which is certainly a strong disincentive to remain a responsible operator. Indeed, the temptation to unconstitutional short cuts in solving the post-operational drainage problem may be coupled with temptation to "soak the rich" as is suggested by the Water Resources Boards Findings of Fact in this case, #66, 67, 68 & 69 (Appendix B).

This case here appealed, provides vivid illustration that the temptation to short cuts is abetted by this Court's decision in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). In *Usery* v. *Turner Elkhorn Mining Co.*, this Court considered the retroactive and "due process" aspects of an act of Congress designed to redress the ravages of black lung disease upon coal miners. In upholding the rather slight retrospective impact of the act (*Id.* at 16) the Court noted that it:

> ". . . long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee." (Id. at 15)

Nonetheless the Court did note that "it does not follow however, that what Congress can legislate prospectively,

[7] Id.

[8] See Justice Powell's opinion in *Usery* v. *Turner Elkhorn Mining Co.*, *supra* at 38, 42-45.

it can legislate retrospectively." (*Id.* at 16) And the Court went on to add that:

> ". . . While the operators have clearly been aware of the danger of pneumoconiosis for at least 20 years, and while they have not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of pneumoconiosis had the law imposed liability upon them, we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . , [or] blameworthiness . . ." (*Id.* at 17)

Nevertheless, this Court upheld "the imposition of liability for the effects of disabilities bred in the past "as justified as a rational measure to spread the costs of the employees disabilities to those who have profited from fhe fruits of their labor—operators and the coal consumers." (*Id.* at 18.) The Courts then refused to assess the "wisdom of Congress chosen scheme by examining the degree to which the 'cost-savings' by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the operators can now be passed on to the consumer." (*Id.* at 19)

The Court concluded in sweeping terms:

> "In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if the former employee terminated his employment in the industry before the Act was passed."

Justice Powell, alone, noted strong reservations about "the rationality of retrospective liability as a cost-spread-

ing device", especially in the coal industry. (*Id.* at 38, 42-44.) He, nonetheless, concurred, because in that case:

> ". . . decided on the Government's motion for summary judgment, the Operators have failed to make any *factual* showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient in the absence of appropriate factual support to override the presumption of constitutionality . . ." (*Id.* at 45)

The Appellant, The New River Company, did make a "*factual* showing" of the irrationality in the case at bar but the circuit court upheld the act and gave short shrift to the claims that the Water Pollution Control Act of West Virginia, as applied, was unconstitutionally retroactive and in violation of the Fourteenth Amendment's "due process" clause. On two attempts the Supreme Court of Appeals refused even to review the lower court decision. This was largely due to the recent precedent of *Usery* v. *Turner Elkhorn Mining Co.* and of the unwillingness of the West Virginia courts to recognize the retrospective nature of the liability imposed here.

This Appellant's experience with the West Virginia judiciary in this case underlines the importance of a plenary review of the issue of the constitutionality of the retrospective imposition of a very costly liability. The issue has two important ingredients: (1) distinguishing between unlawful retroactive changes as opposed to other expectation-upsetting changes in the law and (2) finding a standard for judging truly retrospective laws.

The distinction between abrupt but prospective changes in the law that may upset investment backed expectation

is often confused, as it was by the courts in this case, with retroactive legislation. The Circuit Court of Kanawha County first found that because the liability was to abate a present discharge, it was not retroactive. (Appendix A.) The Court made this finding despite the clear and close analogy between present black lung disease caused by completed mining activity (clearly identified as retroactive, although upheld in *Turner Elkhorn*) and present iron discharges caused by completed mining activity. (Note: The circuit court did find that the source of liability was past mining activity: "Specifically, while the petitioner's mine operation between 1966 and 1973 may not have been the direct cause of the iron discharge, the discharge is the result of past mining operations and originates from an area subject to the petitioner's immediate control." (Appendix A.)

The distinction between abrupt expectation-upsetting changes in the law and retroactive changes needs to be fully analyzed and emphasized by this Court. Both upset expectations; but where the expectation-upsetting change in law is prospective, one can at least avoid legal liability although a large investment may be lost—a coal operator can close the mine. When a change is retroactive, closing the mine does no good. The unexpected liability is imposed. The cost of that liability cannnot be passed to the consumers of coal or weighed in the decision whether to open a mine or to continue mining. The distinction between those cases involving the legitimate frustration of "settled expectations" and those involving unconstitutionally retroactive legislation seems blurred in *Usery* v. *Turner Elkhorn Mining Co.*

More important, once the distinction is made, truly retroactive laws have been upheld in the past only where either the pre-enactment context gave fair warning or

the public necessity for retroactivity was exigent. See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960). *Milliken* v. *United States*, 283 U. S. 15, 23 (1931) is an example of a fair warning justification. The exigent necessity justification is exemplified by *Lichter* v. *United States*, 334 U. S. 742 (1948), where the Court emphasized the exigency created by the war.

In *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, some warning ("operators have clearly been aware of the dangers of pneumoconiosis for at least twenty years") (*Id.* at 767) was combined with a somewhat exigent policy ("satisfy a specific need created by the dangerous condition", *Id.* at 19) in a context of only marginal retroactive impact (*Id.* at 16, *but see*, 40n.4.) and where the "sophisticated questions of economic fact" were not developed by any "factual showing."

By contrast here appellant not only had no warning until 1964 (six years too late, and then only that in the future old source as well as new source pollution would be abated), but most of the activity creating the liability was completed *when mine drainage was expressly privileged*. Moreover, the kind of pollution here was not a public nuisance, like the much persistent and pernicious acid mine drainage might be. See *Commonwealth* v. *Barnes and Tucker Co.* (I) 455 Pa. 392, 319 A.2d 871 (1974) and *Comonwealth* v. *Barnes and Tucker Co.* (II), 371 And 461 (Pa. 1977). Some activity that creates a nuisance, creates a known risk of dangerous disease, or is generally considered immoral might give warning that future liability might attack even retroactively. Whether such warning would be the kind of *fair warning* found in *Milliken*, v. *United States*, *supra*, *is* problematic. But here even that warning was missing.

Moreover, there is no public exigency here. These deposits if unsightly, are not dangerous to human health or safety, not dangerous to the flora and fauna of a stream beyond a very limited area, *all owned by the Appellant.* T.55.

By further contrast with *Usery* v. *Turner Elkhorn Mining Co.*, in the case at bar there is a well developed (but not lengthy) record as to the specific impact on appellant of this retrospective legislation (a transcript of 306 pages). Even the findings of fact of the Water Resources Board (Appendix B), especially #4, give specific factual support to Justice Powell's general statement, in his concurring opinion in *Usery* v. *Turner Elkhorn Mining, Co., supra* at 43-44, of the irrational nature of retrospective liability as a cost spreading device, especially in the coal industry.

Appellant will not contend that *Calder* v. *Bull*, 3 U. S. (3 Dall.) 386 (1798) be overruled as is urged in a recent book, Siegman, *Economic Liberties and the Constitution* (1981); but, retrospective laws that bring crushing liability as cruel as any fine ought to be closely scrutinized, ought to be treated differently than mere economic due process cases, and ought to be upheld only under special circumstances. *Calder* v. *Bull* itself teaches that retrospective laws, even if not *ex post facto*, are generally "unjust" and "may be oppressive; and it is a good general rule that a law should have no retrospect". (*Id.* at 391.) Retrospective laws express not merely irratiional policy; they involve what the late Professor Lon Fuller called the "Internal morality of law itself." *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

In sum, what we have here is *non*acidic iron mine drainage from long abandoned mines which ought to be

cleaned up at public expense or by present consumers of coal through an industry-wide tax.[2] In fact, such a program has been undertaken by the Federal government called the *Abandoned Mine Reclamation Program*, part of the *Surface Mining Control and Reclamation Act of 1977*. Act of August 3, 1977, Pub. L. 95-87, 91 Stat. 447 codified as 30 U. S. C. § 1201, §§ 1231-43. New River, along with all other operators, pays 15 cents to a rehabilitation trust fund for every ton of coal it *presently* deep mines. West Virginia could augment such clean up effort with a similar tax of its own. There is no need for "oppressive retroactive measures. This case presents an important and substantial issue as to the constitutionality of such measures as upheld by the West Virginia Courts.

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[2]The initial cost to New River of the sort of plant the State of West Virginia would require, and which would *not* solve the pollution problem, was estimated by appellant's expert at hearing to be two million dollars, with another $1,241,000 per year in operating costs. T. 136-137.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

WILLARD A. SULLIVAN
JOHN J. COWAN
SULLIVAN AND COWAN
220 Morrison Building
P. O. Box 3712
Charleston, WV 25337
Counsel for Appellant

OF COUNSEL:
JAMES AUDLEY MCLAUGHLIN
College of Law
West Virginia University
Morgantown, West Virginia 26505

August 1, 1981

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
CHARLESTON, WEST VIRGINIA 25301

THOMAS E. McHUGH
JUDGE

October 22, 1980

WILLARD A. SULLIVAN, ESQUIRE
P. O. Box 3712
Charleston, West Virginia 25337

CHAUNCEY H. BROWNING, ESQUIRE
KAREN G. WATSON, ESQUIRE
ROBERT D. POLLITT, ESQUIRE
Office of the Attorney General
State Capitol
Charleston, West Virginia 25305

Re: NEW RIVER COMPANY VS.
DAVID ROBINSON, CHIEF
Water Resources Division
Department of Natural Resources,
State of West Virginia
Civil Action No. CA-79-100

Dear Counsel:

This case is before this Court upon the appeal of the petitioner, the New River Company, from the July 31, 1979, final order of the West Virginia Water Resources Board, which order affirmed a prior administrative order denying the petitioner a permit to abandon its Cranberry mine operation.

This Court has thoroughly examined the entire record in this matter, including all pleadings, exhibits, and transcripts and the memoranda of law filed by counsel.

The evidence indicates that from 1905-1958, a deep mine was operated at the Cranberry site. In 1966, the petitioner reopened this mine on a limited basis and continued operations until 1973.

In September, 1973, the petitioner applied to the Water Resources Division of the West Virginia Department of Natural Resources for a water pollution control permit to abandon the Cranberry mine. This application for a permit was denied by the Chief of the Water Resources Division of the West Virginia Department of Natural Resources in March, 1975. This ruling denying the permit was affirmed on appeal in April, 1976, by order of the West Virginia Water Resources Board.

On June 15, 1976, the petitioner submitted to the Water Resources Division of the West Virginia Department of Natural Resources a second application (D-641) to abandon its Cranberry mine operation. This second application for a permit was denied by the Chief of the Water Resources Division on November 5, 1976. Subsequently, the petitioner appealed this ruling and a hearing was held on November 14, 1978, before the Water Resources Board. By final order dated July 31, 1979, the Water Resources Board affirmed the decision of the Chief of the Water Resources Division denying the permit.

It is from this July 31, 1979, final order of the Water Resources Board of the Department of Natural Resources that the petitioner appeals to this Court.

The evidence indicates that since the 1930's water from the Cranberry mine has mixed with water from other abandoned mines in the area and has flowed to a low point at the Price-Hill mine shaft. From the Price-Hill

mine shaft, this water has and continues to be discharged into Dunloup Creek.

There is no dispute in the record that this water originating from the abandoned mines, including the Cranberry mine, includes particles of iron. This iron settles out and deposits upon the Dunloup creek bed.

In its application (D-641) denied by the Water Resources Division and affirmed by the Board, the petitioner proposes to control and limit the iron deposits into Dunloup Creek by means of a series of dams.

Prior to 1979, [sic] there was no statutory requirement to obtain a permit from the West Virginia Department of Natural Resources prior to the abandoning of a mine.

In 1969, however, West Virginia Code, 20-5A-5 of the Water Pollution Control Act was amended to provide that, unless a permit was obtained, it would be unlawful to abandon any mine where such abandonment "may cause or might reasonably be expected to cause a discharge into or pollution of waters of the state."

It should be noted that the Water Pollution Control Act has been amended several times since 1969 to further aid the Department of Natural Resources in its duty to protect the waters of the state. The 1969 amendment requiring a permit with respect to the abandonment of mines remains in the Act.

Essentially, the petitioner challenges in this appeal the requirement that it obtain a permit before closing its Cranberry mine. In this regard, the petitioner has raised constitutional and other issues. Principally, the petitioner asserts that the iron discharged into Dunloup Creek is not the result of its abandonment or prior operations at the Cranberry mine between 1966 and 1973, but rather is

a discharge which began long before the permit requirement was enacted. Therefore, the petitioner concludes that it is improper to subject it to the requirement of obtaining a permit. The petitioner further asserts that its proposal to control the iron deposits in Dunloup Creek should have been adopted by the Division of Natural Resources.

Nevertheless, this Court, upon careful examination of the record and relevant authorities, is of the opinion that the conditions of the petitioner are without merit and that the final decision of the Water Resources Board should be affirmed.

There is no dispute in the record that the discharge of the iron deposits into Dunloup Creek is continuing. Accordingly, as stated in the memorandum of law filed by the respondent, it is a present rather than a past discharge that the Water Resources Division is seeking to control through its permit requirement. Specifically, while the petitioner's mine operation between 1966 and 1973 may not have been the direct cause of the iron discharge, the discharge is the result of past mining operations and originates from an area subject to the petitioner's immediate control. Therefore, the provision of West Virginia Code, 20-5A-5 requiring a permit to abandon a mine where there is a discharge is applicable to the petitioner.

This section, as part of the Water Pollution Control Act, should be liberally construed. *City of Huntington* v. *State Water Commission*, 135 W. Va. 568, 64 S.E.2d 225 (1951). Moreover, inasmuch as the Water Resources Division is seeking to control an existing condition, this Court is of the opinion that West Virginia Code, 20-5A-5, is not being applied to the petitioner retroactively.

Nor does the permit requirement place an unjust burden upon the petitioner. Clearly, any burden imposed upon the petitioner in obtaining the permit to close its Cranberry mine must be balanced with the interests of the public in maintaining a certain standard for its streams and waterways. As West Virginia Code, 20-5A-1 provides:

> "It is declared to be the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development."

Such a balancing test between the rights of the petitioner and the rights of the State has been judicially applied in previous cases and in view of such a test, this Court, upon reviewing the evidence, concludes the burden placed upon the petitioner by the permit requirement to be neither unconstitutional nor unjust.

In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), cited by the petitioner, the Supreme Court of the United States upheld challenged provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972. As the Court in *Turner Elkhorn* observed:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish

that the legislature has acted in an arbitrary and irrational way." (428 U.S. at 15).

As the Court in *Turner Elkhorn* further stated:

"But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." (428 U.S. at 16).

Accordingly, upon all of the above, this Court is of the opinion that the permit requirement of West Virginia Code, 20-5A-5 is applicable to the petitioner and that the Water Resources Board acted properly in affirming the denial of the petitioner's D-641 application. Therefore, the July 31, 1979, order of the Water Resources Board is hereby affirmed.

A proper order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,

THOMAS E. MCHUGH
Judge

TEM:lm

APPENDIX A (Con't.)

STATE OF WEST VIRGINIA

At a Circuit Court for Kanawha County held at the Court House thereof on the 24th day of December 1980.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE NEW RIVER COMPANY,
Petitioner,

v. CIVIL ACTION NO. AP-CA-79-100

DAVID W. ROBINSON, CHIEF,
WATER RESOURCES DIVISION,
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WEST VIRGINIA,
Respondent.

ORDER

Upon the petition of the appellant New River Company for review of the administrative decision of the Water Resources Board of West Virginia entered by the Board on July 31, 1979, in the above-styled cause, and after consideration of the pleadings, transcript and record before said Board, and upon further consideration of the petition of the appellant and the briefs, memoranda and oral arguments of counsel for the respective parties hereto, this Court, in accordance with the opinion of this Court entered in this cause on October 22, 1980, a copy of which is attached hereto and is incorporated herein by reference, does hereby approve the findings of fact and conclusions of law of the Water Resources Board and does hereby affirm the Order of the said Board entered on July 31, 1979.

Further upon the motion of the appellant for rehearing and upon consideration of the argument of coun-

sel for the respective parties on the 19th day of December, 1980, the Court does hereby deny appellant's motion and does further grant the appellant a stay of this order for a period of ninety (90) days from the date hereof for the purpose of permitting the appellant to perfect the record of this action for appeal.

Entered this 24th day of December, 1980.

/s/THOMAS E. MCHUGH
Judge

* * *

APPENDIX B

BEFORE THE WATER RESOURCES BOARD OF WEST VIRGINIA

NEW RIVER COMPANY,
Appellant,

v.

APPEAL NO. 104
CASE NO. 284

DAVID ROBINSON, CHIEF,
WATER RESOURCES DIVISION,
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WEST VIRGINIA,
Appellee.

ORDER

This appeal is brought by the New River Company, a West Virginia corporation, whose principal place of business is located in Mount Hope, West Virginia. The appellant filed its Notice of Appeal with the Water Board on December 3, 1976. The said Notice alleged that the appellant is aggrieved by an Order of the Chief dated November 5, 1976, directed to the appellant denying the appellant's application for a water pollution control permit.

The Notice of Appeal, having been timely filed with this Board and duly and properly served upon the appellee herein, and this appeal having matured for hearing, the said hearing thereon having been held on the 14th day of November, 1978, the appellant having been present and represented by its counsel, Willard A. Sullivan, and the appellee having been presented and represented by its counsel, Robert D. Pollitt, Assistant Attorney General, and Karen Watson, Special Assistant Attorney General, and, after presentation of evidence by the parties and oral arguments and briefs by the respective counsels for the parties, this appeal is matured for decision.

FINDING OF FACT

1. The application D-641 is for a permit to abandon the Cranberry Mine. Since the 1930's water from the Cranberry Mine has mixed with water from other abandoned mines in the area and has flowed into the Price-Hill Mine from which it has been discharged by the Price-Hill shaft into Dunloup Creek.

2. The New River Company was incorporated in the State of West Virginia in 1906. The New River Company is a subsidiary of the Western Pocahontas Corporation, which is a subsidiary of the C & O Railway Company, which is a subsidiary of the Chessie System.

3. The New River Company is engaged in the deep mining of coal.

4. The New River Company owns land primarily in two counties of West Virginia. In Raleigh County the Company owns 2400 acres of which 40-50% of the appellant's reserves have been mined. In Fayette County the Company owns 61,000 acres of which 85-90% of the Company's reserves have been mined.

5. The Dunloup Creek is a tributary of the New River and flows through the communities of Kilsyth, Glen Jean and Mount Hope in Fayette County before entering the New River at Thurmond, West Virginia.

6. In 1903 the Price Hill Mine was opened. The Price Hill Mine was a deep mine engaged in the removal of the Sewell seam of coal.

7. In 1905 the Cranberry Mines, the Sprague Mine and the Skelton Mine were opened as deep mines to remove the Sewell seam of coal.

8. The Price Hill Mine, the Cranberry Mine, the Sprague Mine and the Skelton Mine were deep mines

owned by separate companies and all of the mines were adjacent to each other.

9. In 1906 the New River Company was formed to combine the Cranberry Mine, the Sprague Mine, the Skelton Mine and the Price Hill Mine.

10. In 1907 the Mabscott Mine was opened.

11. During the deep mining of the Sewell seam by the New River Company, the Cranberry Mine, the Skelton Mine, the Sprague Mine, the Mabscott Mine and the Price Hill Mine were interconnected to provide drainage for the water occuring in those mines.

12. In the mining of the Sewell seam of coal there are water problems.

13. In the mining process, the Company established a drainage pattern through those mines which caused the waters in the mines to be discharged through the Price Hill Mine at its Price Hill Hoist Shaft.

14. The discharge at the Price Hill Shaft from the mines named in Paragraph 8 enters the waters of Dunloup Creek.

15. The New River Company mined the Cranberry Mine from 1905 through 1958.

16. In 1966 the New River Company reopened the Cranberry Mine to pull the pillars of coal remaining in the mine after the first operation.

17. The second mining in the Cranberry Mine by the New River Company covered a period during the years 1966 to August, 1973.

18. A portion of the Cranberry Mine is inundated with water. The water accumulates as a result of the drainage pattern interconnecting the aforenamed mines.

19. The New River Company recovered approximately 1.6 million tons of coal between 1966 and August 1973 in its operation of the Cranberry Mine.

20. During the operation of the Cranberry Mine between 1966 and 1973, water, whether it be make-up water or underground water, flowed from the Cranberry Mine along the dip of the coal in the Cranberry Mine to the inundated portion of the Cranberry Mine.

21. The water accumulated in the Cranberry Mine flows through the Price Hill Mine and discharges from the Price Hill Hoist Shaft and into the waters of Dunloup Creek.

22. The water which is discharged through or at the Price Hill Shaft contains iron.

23. That the iron contained in the water at the Price Hill Shaft after leaving the Price Hill Shaft oxidizes and deposits upon the stream bed and banks of Dunloup Creek.

24. The iron deposits occurring in Dunloup Creek are orangish red in color.

25. The iron deposits on the bed and banks of Dunloup Creek occur for a distance of 4.2 miles downstream from the entry of the discharge from the Price Hill Shaft into Dunloup Creek.

26. The flow from the Price Hill Shaft discharge into Dunloup Creek fluctuates between approximately 2.8 to 10 million gallons per day.

27. The water discharged at Price Hill Shaft accumulates iron as it passes along the exposed coal seams in the mines.

28. That the water discharged from the Price Hill Shaft into Dunloup Creek contains iron varying from 3.0 milligrams per liter of water to 12.0 milligrams per liter of water.

29. That the water samples taken by the personnel of the Water Resources Division were taken in accordance with standards for the taking of water samples approved and certified by the United States Environmental Protection Agency.

30. The water samples taken by the personnel of the Water Resources Division were analyzed in accordance with the standards and methods for testing and analysis of water samples approved by the United States Environmental Protection Agency.

31. That on the 15th day of June, 1976, the appellant submitted application D-641 to the Water Resources Division of the West Virginia Department of Natural Resources.

32. That application D-641 was an application to abandoned the Cranberry Mine.

33. That application D-641 stated that a discharge connected with the Cranberry Mine was occurring from the Price Hill Shaft into Dunloup Creek.

34. The application D-641 submitted by the appellant proposed the construction of a series of dams constructed of cement block in Dunloup Creek to effectuate the areathe bed of Dnuolup Creek.

35. On November 5, 1976, the Chief of the Water Resources Division, West Virginia Department of Natural Resources, issued an order denying the issuance of a water pollution control permit to the New River Company based on application D-641.

36. The order of the Chief stated that field inspections showed the effluent from the Price Hill Shaft to be causing a violation of Section 3.01(b) of the Administrative Regulations of the State of West Virginia for Water Quality Criteria on Inter and Intrastate streams.

37. The order of the Chief further stated that application D-641 contained a proposal to deliberately deposit pollutants from the Price Hill Shaft on the bottom of Dunloup Creek.

38. That § 3.01(b) of the Administrative Regulations of the State of West Virginia for Water Quality Criteria on Inter and Intrastate Streams states:

> "Certain characteristics of sewage, industrial wastes or other wastes or factors which render waters directly or indirectly detrimental to the public health or unreasonably and adversely affect such waters for present or future reasonable uses are objectionable in all waters of the State. Therefore the State Water Resources Board does hereby proclaim that the following general conditions are not to be allowed in any waters of the State.
>
> "No sewage, industrial wastes or other wastes entering any of the waters of the State shall cause therein or materially to contribute to any of the folowing conditions thereof, which shall be minimum conditions allowable:
>
> "(b) Objectionable deposits on bottom or sludge banks."

39. Section 7, Article 5A, Chapter 20 of the Code of West Virginia, subsection (b) thereof, states:

> "The department's permit shall be issued upon such reasonable terms and conditions as the chief may direct if (1) the application, together with all

supporting information and data and other evidence, establishes that any and all discharges or releases, escapes, deposits and disposition of treated or untreated sewage, industrial wastes, or other wastes, or the effluent therefrom, resulting from the activity or activities for which the application for a permit was made will not cause pollution of the waters of this State or violate any effluent limitations or any rules and regulations of the board."

40. That the appellant performed tests to determine the time required for the iron in the water of the Price Hill Shaft discharge to settle to 3.5 milligrams per liter with the addition of lime to be two hours.

41. That the appellant performed tests to determine the time required for the iron in the water of the Price Hill Shaft discharge to settle to 3.5 milligrams per liter with the addition of hydrogen peroxide to be two hours and fifteen minutes.

42. In designing a treatment facility to reduce the content of the iron in the water of the Price Hill Shaft to a level which will not cause bottom deposits, the design of the facility is determined on the flow of the discharge and the content of iron in water.

43. The design and placement of the treatment facility determines the costs of the facility.

44. The flow of the discharge is a factor in determining the size, design and cost of a treatment facility. If the flow of the discharge is higher than determined then the cost of the treatment will be higher. If the flow of the discharge is lower than determined then the cost of the treatment will be lower.

45. The size of any ponds and their sufficiency to remove or allow the iron to settle is a function of the flow of the discharge.

46. The design of a treatment facility is based upon a combination of the determined time required plus the flow of the discharge.

47. The cost of the treatment proposed in Application D-641 would be approximately $50,000.00.

48. The appellant directed its expert to determine the costs of various alternatives to treat the discharge from the Price Hill Shaft. The appellant's expert based his design of a treatment facility on a flow of ten mililon gallons per day, determined that a treatment consisting of two thickeners, a mixing bin, a lime bin and two ponds would cost approximately $2,078,547.00 and would require an annual operating cost of $992,435.00.

49. The appellant's expert, basing his design of a treatment facility on a flow of ten million gallons of water per day, designed a series of baffles constructed of concrete that the cost of this alternative would be $643,945.-00 in construction and an annual operating cost of $992,-435.00.

50. That appellant's expert basing his treatment facility on a flow of ten million gallons per day considered the construction of a mechanical aeration process and that the cost of the construction of the process would be two million dollars and that the annual operating costs would be $360,000.00 to $4,680.00.

51. That appellant's expert basing his treatment facility on a flow of ten million gallons per day considered the construction of a treat nt plant using the chemical

hydrogen peroxide, the facility designed by appellant's expert would require two ponds containing 5,833,333 gallons of water and the annual costs of operation would be $1,241,000.00 The appellant's expert did not state the cost of the construction of this facility.

52. The appellant's expert also designed a teratment facility without the use of any mechanical or chemical treatment and using a flow of ten millions gallons per day determined that ponds containing forty million gallons capacity would be necessary. The appellant's expert did not quote a price for construction nor annual operating costs of such a facility.

53. The area upstream (or above) the discharge at the Price Hill Shaft contains approximately ½ acre of land available for treatment facilities. The are is composed of a coal gob pile.

54. The area downstream (or below) the discharge, approximately 800 feet, contains an area of one acre of land available for treatment facilities.

55. The remainder of the area surrounding the discharge at the Price Hill Shaft contains Dunloup Creek, a state secondary road, a railroad bed and steep mountains.

56. In appellant's exhibit No. 7, there are designed two ponds with a total capacity of 452,899 gallons upstream of the discharge at Price Hill Shaft.

57. The appellant's expert also showed sufficient space downstream below the discharge point to design a pond to contain 1.4 million gallons of water.

58. That personnel of the Division of Water Resources performed certain tests using the hydrogen peroxide

chemical treatment of the discharge of the water at the Price Hill Shaft.

59. That the personnel of Water Resources Divisions performed certain tests using the hydrogen peroxide method of chemical treatment of the discharge of the water based on a flow of 7200 gallons per minute, some twenty percent greater than the flow measurements obtained at the point of discharge of the Price Hill Shaft and the tests showed that ponds with a total surface size of ¾ acre would be sufficient to remove the iron content of 9 milligrams per liter to 3.5 milligrams per liter.

60. That personnel of the Water Resources Division determined the cost of the ponds and treatment facility described in paragraph 58 would require a capital construction cost of $182,000.00 and the facility would require an annual operating cost of $90,000.00 per year.

61. The treatment facility proposed by the personnel of the Water Resources Division was based upon an article published in the Water Pollution Control Federation Journal, July 1977, describing the treatment of a similar discharge containing 35 to 37 milligrams of iron per liter.

62. That personnel from the Department of Natural Resources performed certain electro fishing tests and a kick screen test in Dunloup Creek above the point of entry of the discharge at Price Hill Shaft. At the point of the test above the discharge the personnel collected 5 organism and no fish. The aquatic organisms were pollutant tolerant organisms.

63. That personnel from the Department of Natural Resources performed certain electro fishing tests and a kick screen test approximately 300 feet downstream below the point of entry of the discharge of the Price Hill

Shaft, At the point of this test only three species of aquatic organism were found, again no fish were found.

64. That personnel from the Department of Natural Resources stated that the discharge would have a deleterous effect on the aquatic life in Dunloup Creek.

65. That the property accounts ledger in the balance sheets for the New River Company over the period 1967-1977- shows a constant increase in the property and land holdings of the New River Company.

66. That the balance sheet for the New River Company for the year 1977 shows a surplus balance in the amount of $11,440,687.10.

67. That the surplus balance accounts in the balance sheets of New River Company show an increase from a minus $179,267.05 in 1967 to a plus $11,440,687.10 in 1977.

68. That any statements as to the amount of taxes paid by the New River Company or the amount of salaries paid by the New River Company are irrelevant to the economic feasibility of the alternative methods of treatment.

69. Between the year 1976 and 1977 the New River Company acquired additional coal leases valued at 3 million dollars.

70. That bottom deposits are occurring in Dunloup Creek.

71. That the bottom deposits occurring in Dunloup Creek result from the iron content of the water from the Price Hill Shaft.

72. The Legislature declared the public policy of the

State of West Virginia in relation to the waters of this State:

> "It is declared to be the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the attraction, development, maintenance and expansion of agriculture, mining, manufacturing and other business and industry."

73. The public policy of the Water Resources Board is set out in the administrative regulations heretofore described:

> "Subject: REQUIREMENTS GOVERNING THE DISCHARGE OR DEPOSIT OF SEWAGE, INDUSTRIAL WASTES AND OTHER WASTES INTO THE WATERS OF THE STATE.
>
> "The State Water Resources Board and the Chief of the Division of Water Resources in the State Department of Natural Resources, under Chapter 20, Article 5A, Code of West Virginia, have the power and authority to determine whether any person, firm, municipality or corporation is polluting any of the waters of the State and to prevent, control, eliminate or reduce such pollution. In making such determination, due consideration shall be given, in accordance with the public policy of the State of West Virginia, to the use of available and reasonably practicable methods to control and reduce pollution. In so doing, recognition shall be given to the fact that each stream in the State may represent a separate problem and further, that the use of a watercourse for assimilation of wastes is proper so long as the net results do not cause or contribute to conditions hereinafter not allowed."

74. The proposal for treatment, as submitted by the appellant in application D-641, will not remove the iron deposits occurring in Dunloup Creek but will in fact cause such iron deposits to occur in Dunloup Creek.

CONCLUSIONS OF LAW

Upon consideration of the above findings of fact, the Water Resources Board makes the following conclusions of law:

1. That pursuant to West Virginia Code, Chapter 20, Article 5A, Section 5, Subsection b(6), the New River Company is required to obtain a permit for the treatment of the discharge from the Price Hill Shaft prior to abandoning the mine.

.2 The discharge from the Cranberry Mine through the Price Hill Shaft is contributing the iron deposits to the waters of the State of West Virginia, which iron deposits violate Section 3.01(b) of the Administrative Regulations of Water Quality Criteria for Inter and Intrastate Streams

3. That the Chief acted reasonably and lawfully by issuing the Order dated November 5, 1976, directed to the appellant.

THEREFORE, the Order of the Chief dated November 5, 1976, is hereby affirmed, with the following modifications, the appellant is directed to undertake immediate remedial action which is designed to treat the discharge at Price Hill Shaft to reduce the iron content to a level which will prevent further deposits in Dunloup Creek in violation of 3.01(b) of the Administrative Regulations of this Board.

The appellant shall submit an application to undertake the above-remedial action to the Division of Water Re-

sources within thirty (30) days of the date of this Order, the application shall not contain any proposal for treatment wh;ch requires any method of instream treatment.

Entered this 31st day of July, 1979.

WEST VIRGINIA WATER
RESOURCES BOARD

/s/JOHN C. AILES
Chairman

* * *

RIGHTS OF APPEAL

You are hereby notified that you are entitled to judicial review of the attached Order by filing a petition of appeal with the appropriate Circuit Court of this State in accordance with the provisions of Section 16, Article 5A, Chapter 20 and Section 4, Article 5, Chapter 29, of the Code of West Virginia.

CERTIFICATE OF SERVICE

I, Robert D. Pollitt, Counsel for the Appellee, do hereby certify that a copy of the attached ORDER of the Water Resources Board, together with the Review of the Proposed Orders and the Rationale of the Board's decision, was served upon Willard Sullivan, Counsel for the Appellant, by hand delivering a copy thereof to him at his office in the Charleston National Plaza, this 1st day of August, 1979.

ROBERT D. POLLITT

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 31st day of March, 1981, the following order was made and entered, to-wit:

THE NEW RIVER COMPANY

vs.

DAVID ROBINSON, CHIEF, etc., et al.

On a former day, to-wit, March 23, 1981, came the pettitioner. The New River Company, by Sullivan & Cowan and Willard A. Sullivan, Jr., its attorneys, and presented to the Court its petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this action on the 24th day of December, 1980, with the record therein accompanying the petition, which being seen and inspected the appeal and supersedeas prayed for is refused by a majority of the Court. Justice Neely would grant. Justice McHugh deeming himself self disqualified, did not participate in the consideration of this action.

A True Copy

Attest:
/s/GEORGE W. SINGLETON
Clerk Supreme Court of
Appeals

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of May, 1981, the following order was made and entered, to-wit:

THE NEW RIVER *Company*

vs.

DAVID ROBINSON, CHIEF, WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES

On a former day, to-wit, May 4, 1981, came again The New River Company, by Willard A. Sullivan, his attorney, and presented to the Court his petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this action on the 24th day of December, 1980, with the record therein accompanying the petition, which being seen and inspected the appeal and supersedeas prayed for is refused by a majority of the Court on this second application. Justice Neely would grant. Justice McHugh deeming himself disqualified, did not participate in the consideration of this action.

A True Copy

Attest:
/s/GEORGE W. SINGLETON
Clerk Supreme Court of
Appeals

APPENDIX E

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

THE NEW RIVER COMPANY,
Petitioner

vs.

Kanawha County Circuit Court
Civil Action AP-CA-79-100

DAVID W. ROBINSON, CHIEF,
WATER RESOURCES DIVISION,
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WEST VIRGINIA,
Respondent

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The New River Company, Petitioner in the captioned case, hereby appeals to the Supreme Court of the United States from the order of this court on May 5, 1981, refusing to grant appellant's appeal from Kanawha County Circuit Court judgment and order entered December 24, 1980, in Civil Action No. AP-CA-79-100.

The New River Company takes this appeal pursuant to United States Code, Title 28, Section 1257(2).

JOHN J. COWAN
WILLARD A. SULLIVAN
Counsel for Appellant
P. O. Box 3712
Charleston, WV 25337
Counsel for The New River Company

Of Counsel:
JAMES A. MCLAUGHLIN
College of Law, West Virginia University
Morgantown, WV 26506

AFFIDAVIT OF SERVICE

I, Robin J. Davis, being duly sworn, depose and say that I hand delivered a copy of the foregoing Notice of Appeal to the Supreme Court of the United States to the Office of the Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia, on this 27th day of July, 1981, and receipt was duly acknowledged therefor.

/s/ROBIN J. DAVIS

Sworn to and subscribed before me on this 27th day of July, 1981.

My commission expires May 18, 1981.

/s/KATHLEEN M. JACOBS
Notary Public in and for
Kanawha County, West
Virginia

Receipt is hereby acknowledged by_____

_____on this 27th day of July, 1981.

/s/FREDERICK GEORGE

APPENDIX F

Chronological History of Coal Mine Drainage Law in West Virginia

1903 Acts of the Legislature of 1903, c.47 §452; codified in 1913 under "Fish & Game", 62 §3509, entitled: "Depositing Matter in Stream Deleterious to Propagation of Fish—Penalty" Act said "it is unlawful to allow to enter . . . sawdust or any other matter deleterious to the propagation of fish".

1912 *State* v. *Southern Coal and Transportation Co.*, 71 W.Va. 47, 76 S.E. 970 (1912). Court held coal operators liable for natural mine drainage under 1903 act.

1915 Acts of 1915, 2d. Extra Session, c.5 §1 amended §45a (Code Ch. 62, §3509 entitled [in 1918 Code] "Pollution of Streams.") The following words were added after the part above quoted:

> It shall be lawful, however, to drain or cause to be drained from any mine in the state by the owner or operator thereof the water that naturally collects in such mine and the water from any coal washery, and to discharge the same into any stream, watercourse or water in the state; provided, however, that any mine from which the water is so discharged or drained shall be kept in a sanitary condition and the water draining or flowing from such mine, and from such washery, shall, while in the mine and on the premises of the mine owner or operator, be kept free from pollution by human or animal excrement or substance deleterious to health.

• • •

"with the right to the state board of health to prevent any mine owner or mine operator who fails to comply with the provisions of this act from draining or discharging the water or waters from his or its mine into any stream, water or water-course in the state; provided, further, that any mine owner or operator having one suitable, convenient and sufficient outlet for the water from his or its mine into one stream shall not cause the same to be drained into any other stream."

1921 Acts, 1921 c. 116 reenacted the above, quoted language. It was codified in 1923 Barnes W. Va. Code Anno. as Ch. 62 §20—"Pollution of Streams".

1929 Acts, 1929, c. 14—an act creating the state water commission, etc. It stated in §1: "The term pollution shall mean the contaminating or rendering unclean or impure of any water by any act prohibited by section twenty of Chapter Sixty-Two (62-20) [the privilege]. §9—says act not to be interpreted to repeal Ch. 62 §20, Acts of 1929 language quoted above from 1915 act, "Pollution of Streams".

1931 Official Code of West Virginia of 1931 in Chapter 20, "Game, Fish and Forestry", Article 6 "Fish and Frogs", §6 (20-6-6) quoted the privilege portion of the 1915 act reenacted in 1929 and referred to the prohibition portion of the 1929 act ("provided, however, that any mine from which [etc.] . . . water of this state) which is in 1931 codified in Chapter 22 "Mines and Minerals", Article 2 "Coal Mines", §79 "Drainage from mine to be free of pollution."

In Chapter 16 "Public Health", Article 11, "State Water Commission", the acts 1929, C. 14 is codi-

fied with section numbers tracking the acts numbers, i.e. Acts 1929 C. 14 was §16-11-1 et. seq. W. Va. Code.

1933 Acts 1933 c. 6 amended the 1929 act (c. 14) re "state water commission act" by adding to §5 the following words:

"*Provided, however,* that such commission shall not institute proceedings against any person engaged in the mining of coal and draining mines in compliance with existing law." Thus, this act (codified as Ch. 16, Act. 11) had three section making reference to the natural coal mine drainage privileges, §1, §5, and §9 (§16-11-1, 5, 9, W. Va. Code).

Until 1951, nothing happened of any significance. The codification of the privilege changed sections to §2262 [20-6-6]" in 1932, but the official code still was *1931* (and still is today) and legislative acts continue to refer to the 1931 codification with its §20-6-6 numbering. Amendments to the state water commission act in 1947 (c. 126) eliminated direct reference to the coal privilege in §1 and rewrote the definition of "pollution". However, it retained the same language as the coal operators privilege in §5 and 9, quoted above. The new definition of "pollution" read, "The term pollution means the discharge or deposit or sewage or putrid, nauseous or offensive substances, in such condition, manner or quantity, as may cause any of the waters of the state to be contaminated, unclean, or impure to such an extent as to make such water directly or indirectly detrimental to the public health; unsuitable with reasonable treatment for use as present or possible future

sources of public water supply, or unsuitable for commercial, industrial, agricultural or other reasonable uses. §1 of the 1947 act (W. Va. Code §1401 [16-11-1]) concludes with an indirect reference to the privilege: "Provided, however, that nothing herein contained shall be deemed to amend or affect any section of the Code of West Virginia not herein mentioned."

For completeness, other acts amending the 1933 Act were Acts 1937 C. 130, Acts 1945 C. 102, Acts 197 c. 128.

1951 Acts 1951, c. 103, amended W. Va. Code of 1931, §20-6-6 "Pollution of Stream with Matter Deleterious to Propagation of Fish; Penalty" by adding:

"Except in the counties of Brooke and Hancock" before the privilege portion. The whole thing now read:

Chapter 103

Passed March 10, 1951

Be it enacted by the Legislature of West Virginia:

That section *six*, article *six*, chapter *twenty* of the code of West Virginia, one thousand nine hundred thirty-one, be amended and reenacted to read as follows:

Section 6. Pollution of Streams with Matter Deleterious to Propagation of Fish; Penalty.—It shall be unlawful for any person, firm or corporation to throw, discharge or cause to enter into any stream, watercourse or water in this state, sawdust or other matter deleterious to the propagation

of fish. *Except in the counties of Brooke and Hancock,* it shall be lawful for the owner or operator of any mine or coal washery in this state to drain or cause to be drained therefrom the water that naturally collects in such mine, and the water from such coal washery, and to discharge the same into any stream, watercourse or water in the state, in the manner provided in section seventy-nine, article two, chapter twenty-two of this code: Provided, however, That any mine owner or operator having one suitable, convenient and sufficient outlet for the water from his or its own mine into one stream shall not cause the same to be drained into any other stream. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten or more than one hundred dollars, and such person violating this section, and the officer or agent or any corporation who directs or participates in the violation of this section, may be imprisoned in jail not less than ten nor more than one hundred days, or both such fine and imprisonment may be imposed for such violation.

1953 Acts 1953 c. 145 amended state water commission acts (§16-11-1 et. seq. W. Va. Code of 1931) and eilminated all reference to a natural coal mine drainage privilege formerly contained in §§1, 5 and 9 (§16-11-1, 5, 9) W. Va. Code in §15: "Construction of Act; Inconsistent Acts Repealed" stated as "Being for public health, safety and welfare, this article should be liberally continued to effectuate the purpose thereof, and all other existing laws or parts of laws of this state inconsistent with this

article are hereby repealed"; The 1953 act required in §5 every one "causing a material contribution" of polluting substances to waters must report it to the Commission and after July 1, 1953, permits were required to operate "a *new* sewer disposal system or treatment works"; to *extent* or *modify* an industrial or commercial establishment," and to make "any *new* outlet or *add* to the load from any existing outlet, which would "cause a material pollution . . ." (Emphasis added). In short, the 1953 act purported to control all *new source* pollution but attempted no control over existing sources.

1955 Code of W. Va. of 1955, §2262, recited the natural coal mine drainage privilege, as above, from the 1951 act citing only the 1951 act and no mention was made of the 1953 act.

1959 Acts 1959, c. 79—structural and name changes were made in water resources acts (§16-11-1 & 2 and §20A-1-1 *et seq.* Code of West Virginia of 1931)

1961 In the unofficial Code of W. Va. of 1961, §2262 is gone. Acts, 1961, c. 133 reanacted 1953 act, the pertinent part of which was then modified as W. Va. Code of 1961 §3212 (18)[8] "Pollution Abatement and Control; Reports; Permits, Citations." It retaining language of §5 of the 1953 act quoted above requiring a permit for new source pollution.

1964 Acts 1964, c. 20, enacted new Article 5a: "Water Pollution Control Act" and contained the following pertinent language:

Section 1. Declaration of Policy.—It is declared to be the public policy of the state of West Virginia

1964 (Cont'd)

to maintain reasonable standards of purity and quality of the waters of the state consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the attraction, development, maintenance and expansion of mining, maunfacturing and other business and industry, and to that end to encourage by voluntary coperation, and to require when necessary, the use of available, reasonable, practicable and economically feasible methods to control and reduce the pollution of the waters of the state of West Virginia.

PART III. PERMITS

* * *

Sec. 5. When Permits Required.—(a) It shall be unlawful for any person, until the department's permit therefor has been granted to:

(1) Extend, modify or add to any industrial or commercial establishment so as to result in or effect any *substantial change* in the kind, characteristics and rate of flow of the sewage, industrial wastes, or other *wastes* or the effluent therefrom, *into the waters of this state;*

(2) Make, cause or permit to be made any *new outlet* or *substantially enlarge or add to the load* of any existing outlet, emerging into the waters of this state, whether operated by gravity flow or pump, or a combination thereof, including without limiting the generality of the foregoing, *outlets for mine water drainage,* plant drainage, institution drainage and commercial and industrial

1964 (Cont'd)

establishment drainage of whetever kind or character;

(3) Acquire, construct, install or operate a new disposal system for the direct or indirect discharge or deposit of sewage, industrial wastes, or other wastes or the effluent therefrom, into the waters of this state; or

(4) *Substantially extend, modify or add* to a new or existing disposal system for the direct or indirect discharge or deposit of sewage, industrial wastes, or other wastes or the effluent therefrom, into the waters of this state;

if any such activity will cause a material pollution of the waters of the state.

* * *

Sec. 2. Definitions

(j) "Establishment" shall mean an industrial establishment, mill, factory, tannery, paper or pulp mill, *mine,* colliery, breaker or mineral processing operation, quarry, refinery, and each and every industry or plant or works *in the operation of which industrial wastes,* or other wastes are produced;

(m) "Dispsal system" shall mean a system for disposing of sewage, industrial wastes, or other wastes, and shall be construed to include sewer systems and treatment works;

(n) "Outlet" shall mean the terminus or a sewer system or the point of emergence of any water-carried sewage, industrial wastes, or other wastes, or the effluent therefrom, into any of the waters of this state.

1964 (Cont'd)

Sec. 14. Control by State as to Pollution; Continuing Jurisdiction.—No right to *continue existing pollution* of any of the waters of the state shall exist nor shall such right be or be deemed to have been acquired by virtue of past or future pollution by any person. The right and control of the state in and over all waters of the state are hereby expressly reserved and reaffirmed. It is recognized that with the passage of time, additional efforts may have to be made by all persons toward control and reduction of the pollution of the waters of the state, irrespective of the fact that such persons may have previously complied with all orders of the chief or board. However, it is also recognized that there should be continuity and stability respecting pollution control measures taken in cooperation with, and with the approval of, the chief, or pursuant to orders of the chief or board. Therefore, and notwithstanding any provision in this section to the contrary, where a person is complying with the terms and conditions of a permit granted pursuant to the provisions of section seven of this article or where a person has completed remedial action pursuant to an order of the chief or board, additional efforts may not be required until such time as there has been a substantial and material change in the facts and circumstances of the situation to which the permit or remedial action pertains. (Emphasis added.)

1967 Acts 1967, c. 143, amended §20-5A-5 (above) to shorten the language and perhaps to broaden the coverage of §5 (a)(1); to eliminate the specific reference to the "outlets for mine water drainage

[etc.]" of §5 (a)(2) and to stroke the word *"new"* before "outlet" in §5 (a)(2) and before "disposal system" in §5 (a)(3). Those sections then read:

§20-5A-5. When permits required.

(a) It shall be unlawful for any person, until the department's permit therefor has been granted, to:

(1) *Allow* sewage, industrial wastes, or other *wastes*, or the effluent therefrom, produced by or emanating from an *establishment* to flow into the waters of this state;

(2) Make, cause or permit to be *made* any *outlet*, or substantially enlarge or *add to the load of any existing outlet*, for the discharge of sewage, industrial wastes, or other wastes, or the effluent therefrom, into the waters of this state;

(3) *Acquire, construct, install,* or *operate* a *disposal system* for the direct or indirect discharge or deposit of sewage, industrial wastes, or other wastes or the effluent therefrom, into the waters of this state . . .

* * *

§20-5A-7. "Procedure concerning permits required under article; transfer of permits".

Contained the same language as to when the department's permit shall be issued is:

(c) The department's permit shall be issued upon such reasonable terms and conditions as the chief may direct if . . . and/or (2) the application together with all supporting information and data and other evidence, establishes that any and all discharges or deposits of sewage, industrial wastes,

or other wastes or the effluent therefrom *resulting from such proposed* activity *will be* treated [etc.] to the fullest extent technically feasible [etc.] . . ." (Emphasis added.)

1969 Acts 1969, amended §20-5A-5, "Prohibitions, Permits Required", to add among other things a specific reference to "any mine, quarry or preparation plant" and requiring a permit to "open, reopen, operate or *abandon* any mine, etc., wherever the aforementioned activities cause, may cause or might reasonably be expected to cause . . . pollution . . . (Emphasis added).

§20-5A-5(a)(6) then read:

(6) *Open, reopen, operate* or *abandon* any *mine*, quarry or preparation plant, or dispose of any refuse or industrial wastes or other wastes from any such mine or quarry or preparation plant: Provided, That the department's permit shall only be required wherever the *aforementioned activities cause*, may cause or might reasonably be expected to cause a discharge into or pollution of waters of the state . . .

§20-5A-7(c)(2) was amended, substituting for the words "resulting from such proposed activity" the following: "resulting from the activity or activities for which the application for a permit was made."

1974 In Acts, 1974, 2nd Ex. Sess., c. 8:

§20-5A-5(6) was amended to add the requirement of an approved plan for abandonment with every application for a permit to open, reopen or operate any mine, quarry or preparation plant. The added language reads:

"Provided, however, That unless waived in writing by the chief, every application for a permit to open, reopen or operate any mine, quarry or preparation plant or to dispose of any refuse or industrial wastes or other wastes from any such mine or quarry or preparation plant shall contain a plan for abandonment of such facility or operation, which plan shall comply in all respects to the requirements of this article. Such plan of abandonment shall be subject to modification or amendment upon application by the permit holder to the chief and approval of such modification or amendment by the chief . . .

1976 Acts, 1976, c. 92 added to §20-5A-5(b)(6):

"Construct, install, modify" at the beginning of the first sentence and inserted "except that a permit shall be required for any preparation plant" near the middle and just before part quoted above, meaning little to this case.

1978 Acts, c. 80, substituted "point source" for "establishment" in subdivision (b)(1) and in subdivision (b)(5), meaning little to this case.

Motion to Dismiss or Affirm

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

No. 81-207

THE NEW RIVER COMPANY,
Petitioner-Appellant,
v.
DAVID W. ROBINSON, CHIEF,
WATER RESOURCES DIVISION,
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WEST VIRGINIA,
Respondent-Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

ROBERT D. POLLITT
Assistant Attorney General
KAREN GREEN WATSON
Assistant Attorney General
GREGORY W. BAILEY
Deputy Attorney General
State Capitol Complex
Charleston, West Virginia 25305
348-2021
Counsel for Appellee

THE QUALITY PRESS, CHARLESTON, W. VA.

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DEPARTMENT OF NATURAL RESOURCES,
STATE OF WEST VIRGINIA,
Respondent-Appellee.

MOTION TO DISMISS OR AFFIRM

Comes now the Respondent-Appellee pursuant to Rule 16 of the Rules of this Court and moves this Court to dismiss the appeal filed by Petitioner-Appellant or to affirm the judgment below, for the following reasons:

1. The subject of appeal before this Court is a West Virginia statute which seeks to ameliorate the devastating effects of pollution from abandoned mines by requiring all mines abandoned after 1969 to get a permit. The adverse effects of abandoned mine drainage upon West Virginia's streams is well-documented, and it is clearly within the State's police power to control such pollution. Therefore, no substantial federal question is presented by this appeal.

2. On March 31, 1981, after reviewing the Appellant's petition and listening to its oral argument, the West Virginia Supreme Court refused to grant an appeal on the issues raised before this Court. On May 5, 1981, upon petition and argument for rehearing, the State Supreme Court reaffirmed its position, refusing the appeal.

3. The Petitioner-Appellant may not now challenge the validity of Section 20-5A-7 of the West Virginia Code, 1931, as amended, since it did not properly raise that issue below, and the courts below did not expressly rule upon the issue. The provisions of Section 20-5A-5 of the West Virginia Code, 1931, as amended, were considered by the courts below and upheld as being valid.

4. The provisions of Section 20-5A-5 of the West Virginia Code, 1931, as amended, are not retroactive as applied to the Petitioner-Appellant. The Petitioner abandoned its mine some four years after the 1969 amendment to the West Virginia Water Pollution Control Act which required all persons abandoning any mine which had a discharge to get a permit. The fact that the Petitioner had been mining many years prior to the 1969 amendment and that some of that mining activity may have contributed to the discharge is irrelevant to the operation of this statute. The statute, after 1969, regulates the prospective action of abandonment with a discharge. This is unlike the Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), case where this Court found a slightly retrospective effect in that the operators were required to compensate former employees who terminated their employment *prior to* the passage of the act. Although the act reviewed in *Usery, supra,* was determined to be retroactive, this Court, upon further analysis, found the act to be constitutional.

In the case at hand, no such analysis is necessary by this Court, since the provisions of Section 20-5A-5 of the West Virginia Code, 1931, as amended, are clearly prospective in application.

For the reasons stated above, the appeal should be dismissed or the decisions of the courts of West Virginia shoulld be affirmed.

Respectfully submitted,

ROBERT D. POLLITT
Assistant Attorney General

KAREN GREEN WATSON
Assistant Attorney General

GREGORY W. BAILEY
Deputy Attorney General

Appellant's Reply Brief

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APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

WILLARD A. SULLIVAN
JOHN J. COWAN
JAMES AUDLEY MCLAUGHLIN
Counsel for Appellant

SULLIVAN & COWAN
220 Morrison Building
815 Quarrier Street
Post Office Box 3427
Charleston, West Virginia 25334
Telephone: 304-345-6854
September 18, 1981

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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STATE OF WEST VIRGINIA,
Respondent-Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellant, The New River Company, deems it necessary to file this brief in opposition to appellee's motion to dismiss or affirm for the reason that appellee's motion (1) does not address the very substantial question presented in appellant's statement as to jurisdiction, previously filed, and (2) is inaccurate in significant respects.

Both the appellant, in his motion to dismiss or affirm, and the state courts below have failed to perceive the retroactivity problem in this case. The state—expressing its policy of promoting coal mining—had granted a statutory privilege to mining companies to pollute the state's waters in the course of taking coal from the ground. Under the protection of the privilege, this ap-

pellant operated mines, sold its coal, made its profits and distributed its profits to its then owners. Now, however, the State's interpretation of its water-pollution-control statutes is to the effect that the appellant, and its *present* owners must pay for past activity, even though privileged, notwithstanding that present profits will not support paying for 70 years of past privileged mining.

The Attorney General makes two crucial errors in his allegations of no retroactivity in this case: First he asserts that because the permit statute came before the attempt to abandon the reopened mine and because there is a present discharge, there is no retroactivity. There is no doubt that the liability for abatement of the discharge is predicated on mining activity that caused the polluting discharge. The Attorney General's brief in the Circuit Court said: (from reply memorandum p. 17) ". . . *but for* the mining activities, there would be no discharge." If liability is predicated on mining activity and that activity causing the present pollution was completed before the present legislative act then, *a fortiori*, the act is wholly retroactive, which brings us to the attorney general's second error.

By the following phrase the attorney general implies that the mining activity causing the pollution was not all done prior to the Act: "The fact that the petitioner had been mining many years prior to the 1969 amendment and that *some* of that mining activity may have contributed to the discharge is *irrelevant* to the operation of this statute (*i.e.* §20-5A-5)." (Emphasis added.) Appellee's Motion To Dismiss Or Affirm, p. 2, § 4. Nothing is cited to support this wholly false statement. It is contrary to the Court's finding, the Water Resource Board's finding and the evidence, all of which supports

the conclusion that all the mining activity causing the present pollution antedated the Act. This was set out in our jurisdictional statement.

The problem presented here, then, is one that Mr. Justice Marshall and Mr. Justice Powell both recognized in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). Mr. Justice Marshall recognized that what a legislature may do prospectively, it may not necessarily do "retrospectively," citing as important factors (1) what "danger" is "known" and (2) the "reliance" on past law. *Id.* 16-17.

Here the "danger" (of the pollution) is "known": there simply is no danger. The record demonstrates that there is no danger to the waters or to the fish or to plant life from the appellant's iron discharge, which, fortunately, *settles completely out of the water onto the company's own land.* Here too, the company was entitled to rely upon past law which was not silent, as it was in *Usery*: the past law expressly authorized the mining activity and resultant pollution about which the State, through appellee, now complains. In *Usery*, Mr. Justice Powell, in a concurring opinion, expressed his concerns about imposing retroactive liability, although in *Usery*, unlike the instant case, liability was upon the entire coal industry. *Id.*, at 42-44.

In short, this is precisely the case which Mr. Justice Powell and Mr. Justice Marshall anticipated in their separate opinions in *Usery*. Here is a case of obvious retroactivity, without knowledge or notice of liability to appellant, which had notice and knowledge only of its privilege when it set out on its economic venture.

Clearly, then, this case presents questions of retroactivity, of fairness, of knowledge and of notice, all of

which should be resolved in favor of appellant, the New River Company.

The problem of retroactive environmental correction is a worrisome and important problem, especially acute in the coal producing hills of Appalachia, but national in scope. It produces unusually strong temptation toward unfair measures for its solution. *Usery* v. *Turner Elkhorn Mining Co., supra,* is presently being interpreted by states to sanction *any and all* measures, including retroactive measures, without constitutional limitation. This case shows the need to clarify the appropriateness, and to outline the constitutional boundaries, of retroactive legislation.

For the reasons stated, the State's motion to dismiss or affirm should be denied, and probable jurisdiction should be noted.

WILLARD A. SULLIVAN
JOHN J. COWAN
JAMES AUDLEY MCLAUGHLIN
Counsel for Appellant

SULLIVAN & COWAN
220 Morrison Building
815 Quarrier Street
Post Office Box 3427
Charleston, West Virginia 25334
Telephone: 304-345-6854
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